1987

Downtown Athletic Club and David Yurth v. Sid Horman and S.M. Horman & Sons Co. : Petition for Writ of Certiorari

Utah Supreme Court

L.R. Gardiner; Chapman and Cutler.
Lorin N. Pace; Pace and Parsons.

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DOCKET NO. 870371

IN THE SUPREME COURT

STATE OF UTAH

DOWNTOWN ATHLETIC CLUB, a Utah Corporation
Plaintiff and Appellant, :

vs. :

S.M. HORMAN, an individual aka SID HORMAN, S.M. HORMAN & SONS, a partnership, & S.M. HORMAN & SONS CO.
Defendants. : Case No. ~~86-0109~~ 870371

S.M. HORMAN & SONS COMPANY,
Defendant, Counter-
Plaintiff & Respondent, :

vs. :

DOWNTOWN ATHLETIC CLUB, a Utah Corporation, & DAVID YURTH, an individual
Counter-Defendants & Appellants. :

PLAINTIFF-APPELLANT
PETITION FOR WRIT OF CERTIORARI
FROM DECISION
OF UTAH COURT OF APPEALS
DATED JULY 28, 1987

FILED
OCT 13 1987
Clerk, Supreme Court, Utah

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QUESTIONS PRESENTED FOR REVIEW

1. The decision of the Court of Appeals affirming the decision of the Third Judicial District has the effect of establishing a rule of law that a Summary Judgment is appropriate when discovery is still pending.

2. The decision of the Court of Apeals has the effect of establishing a rule of law that a court need not take the view most favorable to the party resisting a Motion for Summary Judgment.

The decisions of the Court of Appeals as established above are contrary to established case law as set forth elsewhere in this petition.

REFERENCE TO OFFICIAL REPORT OF DECISION OF COURT OF APPEALS

This petition is based upon the decision of the Court of Appeals of the State of Utah, bearing the caption of this peition Court of Appeals # 860109-CA dated July 28, 1987. A copy of the opinion from which this petition is taken is attached n the appendix.

STATEMENT OF GROUNDS FOR JURISDICTION

A. The Judicial decision of the Court of Appeals of the State of Utah was rendered July 28, 1987.

B. Pursuant to Rule 45 (e) Petitioner obtained an extension of time within which to file this Writ.

C. This Writ is filed within that extension period.

PROVISIONS OF LAW

The provision of law governing the issues herein arises out of Rule 56 (Summary Judgment) the pertinent portion thereof is as follows: Rule 56 (b) & (c) U.R. of C.P. state as follow:

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment wrought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

The case before the Court involves written and oral lease agreements. The case is complex with many issues involved. The issues before this Court and or appeal before the Court of Appeals deal with procedural issues.

1. After depositions had been taken of the Plaintiff's President, David Yurth, and of the Principal Defendant, S.M. Horman, the Defendant's counse filed a Motion for Summary Judgment.

2. Defendant had noticed up its motion for summary judgment to be heard at 8:30 a.m. on November 16, 1984. (R.387)

3. Present counsel was retained only 24 hours prior to the hearing (R.388)

4. Counsel filed a petition for extraordinary review and request for additional time to respond to and argue in opposition to motion for Summary Judgment. (R.387) That motion was denied. However, the court gave leave to file a memorandum within 20 days. (R. 386)

5. Defendant in support of summary judgment cited affidavits of six persons. Further, the deposition of Sidney Horman was extensively cited.

6. Many of the persons named were complete strangers to Plaintiff and Plaintiff desired and gave notice of taking their depositions.

7. Upon receipt of notice of deposition of Sidney Horman and others, Defendant's counsel responded saying:

> With respect to the depositions you have noticed, it is my understanding of the Judge's ruling that any further discovery necessarily awaits his ruling on the motion for summary judgment. Should that motion be granted, there would, of course, be no further discovery. If the motion shold be denied, I shall be pleased to cooperate with you in setting dates. (Your notices conflict with other depositions previously scheduled by me, and I would not be able to accomodate you in those dates in any event.) (R. 434)

8. Plaintiff submitted an affidavit in support of its motion for extraordinary review. (R. 570) Said affidavit (R. 576) alleged the need to take the deposition of nine persons. Notices of deposition were served on Roger Evans, Bill Selvig, Mike Chitwood, William Oswald and Sid Horman. (R. 579, R. 581 through R. 587)

Defendant would not make himself available for deposition as is shown above.

The affidavits submitted by Plaintiff raised issues of fact. The lower court denied motion to certiorari, denied motion to compel further discovery and granted summary judgment.

Petitioner feels that said decision was contrary to case law established by this court.

ARGUMENT FOR ISSUANCE OF WRIT

POINT 1. PLAINTIFF, THROUGH COUNSEL, WAS NOT GIVEN THE OPPORTUNITY TO CONDUCT DISCOVERY TO ADEQUATELY RESPOND TO DEFENDANT'S AFFIDAVITS OF FACT. It would not greatly have delayed the proceedings to have allowed the discovery. The court in Cox vs. Winters 678 p. 2d 311 (Utah, 1984) stated:

> Trial court abused its descretion in denying investors opportunity to conduct further discovery prior to granting attorney's motion for summary judgment. .

It is axiomatic that a summary judgment ought not to be granted if all facts cannot be placed before the court.

Thus, Plaintiff was told that Plaintiff could not do discovery necessary to respond to the summary judgment motion until after the decision was entered. The affidavits of Defendants were clearly created by Defendant to support its case. Plaintiff had no opportunity to conduct discovery related to the alleged facts. The case is complicated and has resulted in voluminous pleadings. (Defendant's counsel even apologizes for length of his brief. R.323).

Plaintiff requested time and the opportunity to conduct further discovery. Such request was denied, and the conducting of additional discovery would not have prejudiced Defendant. The result was that all of the facts were not and are not on the table.

In a similar fact situation, Auerbachs vs. Kimball, Supreme Court, State of Utah, November 15, 1977, 572 P. 2d 376, the Court said:

> The granting of the motion for summary judment was premature, because Kimball's discovery was not then complete. It was the information sought in the proceedings for discovery, which Kimball claimed would infuse the issues with facts sufficient to defeat a motion for summary judgment, and sustain his counter-claim. Whether such would be the case cannot now be determined, because such facts, if they exist were not allowed to be discovered.

When a motion is made opposing summary judgment, on the ground discovery has not been completed, the court should grant a continuance or deny the motion for summary judgment; unless the motion in opposition is deemed dilatory or without merit. If the motion for summary judgment is denied, the denial should be without prejudice to its renewal after an elapse of adequate time for completion of discovery.
The affidavits and depositions cited have controverted the facts alleged by Defendant and raise reasonable issues of fact.

POINT IV. SUMMARY JUDGMENT MAY ONLY BE GRANTED WHERE THERE IS NO ISSUE OF FACT:

The court is not called upon to weigh evidence or make findings of fact. Burningham vs. Ott 525 P. 2d 620 (Utah, 1974). The court is not permitted to nor required to make findings of fact but can only find that there are no issues of fact. Carr vs. Bradshaw Chevrolet Co. 464 P. 2d 580 23 Ut. 2d 415 (Utah 1970) and the court cannot consider weight or credibility of witnesses Singleton vs. Alexander 431 P. 2d 126, 19 Ut. 2d 292.

Further, to sustain a motion for summary judgment, the pleadings, evidence, admissions and inferences should be most favorably reviewed from point of view of the party opposing summary judgment, and must show that there is no issue of material fact Frederick May & Co. vs. Dunn 368 P. 2d 266, 13 Ut. 2d 40 (Utah, t1962) See also Bowen vs. Riverton City 656 P. 2d 434.

CONCLUSIONS

1. Plaintiff was not given an opportunity to conduct discovery necessary to properly place all facts before the court.

2. The facts upon which Defendant relies have been controverted.

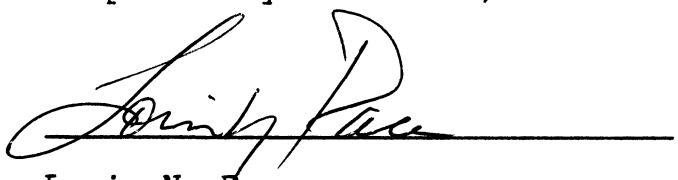
3. The court is required to determine only that there are no issues of fact. This is clearly not the case.

4. Reviews of materials submitted in affidavits and depositions must be interpreted in the light most favorable to the Plaintiff.

Based upon the foregoing, the decision and opinion of the Court of Appeals is contrary to established case law of this court.

Petitioner respectfully requests that this court hear the issues here presented.

Respectfully Submitted,



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CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that I hand delivered a copy of the foregoing Petition for Writ of Certiorari this 13th day of October, 1987 to:

L.R. Gardiner, Chapman & Cutler, 50 South Main, SLC, Ut. 84110

IN THE UTAH COURT OF APPEALS

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Downtown Athletic Club, a Utah Corporation, Plaintiff and Appellant, v. S. M. Horman, an individual a/k/a Sid Horman; S. M. Horman & Sons, a partnership; and S. M. Horman & Sons Company, Defendants and Respondents.	OPINION (For Publication) Case No. 860109-CA
S. M. Horman & Sons Company, Counter-Plaintiff and Respondent, v. Downtown Athletic Club, a Utah corporation, and David G. Yurth, an individual, Counter-Defendants and Appellant.	

Before Judges Billings, Garff, and Jackson.

Billings, Judge:

Appellant, Downtown Athletic Club ("DAC") appeals from the district court's judgment denying its motion to continue and its motion to compel further discovery, and granting respondents' (jointly referred to as "Horman") motion for summary judgment. DAC contends that the trial court erred in ruling as a matter of law that the conditions precedent to the parties' agreement were not satisfied thus discharging Horman's obligation to perform. We affirm.

DAC executed a written agreement with S. M. Horman on May 8, 1981 entitled "Construction & Lease Agreement for the Downtown Athletic Club" ("Construction & Lease Agreement"). This agreement provided that Horman would construct athletic

clubs and then sublease the clubs to DAC. The Construction & Lease Agreement delineated several conditions precedent to Horman's obligation to perform:

1. Horman would construct improvements to the Harver Warehouse Building provided that the Harver Warehouse Building could be reinforced at a price that was acceptable to both Horman and DAC, and in a manner that would satisfy the building code requirements of the Salt Lake City Building Department.

2. Horman was to commence construction only after confirmed receipt and acceptance by Horman of construction financing acceptable to Horman, and the entire lease was specifically subject to Horman being able to secure sufficient financing at a rate not to exceed 12% per annum and that DAC should pay all annual interest charges in excess of 12% per annum provided Horman did decide to pay a higher interest rate than 12%.

3. DAC had use of office space in the old Kress Building only if it paid the nominal rent of $1.00 per month.

4. Horman was obligated to construct the athletic clubs only if DAC sold a sufficient number of memberships prior to beginning construction of the athletic clubs in order to guarantee that the payments required by the Construction & Lease Agreement would be paid.

5. DAC was to assign dues income of individual membership contracts, by contract number, to a special account designated solely for the payment of monthly lease payments to verify that there were sufficient funds available.

DAC contends that the parties orally modified the Construction & Lease Agreement by including an assignment of part of Horman's leasehold interest in the Harver Warehouse Building to DAC. This oral agreement also contained conditions precedent most of which were identical to those enumerated in the Construction & Lease Agreement:

1. The owners of the Harver Warehouse Building had to completely and absolutely release Horman from all obligations under the lease and accept DAC as the new lessee in place of Horman.

2. Engineering studies had to be completed and approved by Salt Lake City for the renovation of the Harver Building.

3. Adequate financing for the completion of the construction of the athletic club(s) had to be secured.

Horman served notice on DAC to "quit the premises" after it sold some of the subject property to the Salt Lake Acquisition Group. Consequently, DAC filed suit against Horman on seeking specific performance and damages for breach of the written and oral agreements. Horman filed its answer and counterclaim for declaratory judgment, tortious waste, unlawful detainer, and slander of title on January 6, 1984.

Comprehensive discovery ensued with each party producing hundreds of documents. Discovery ended with the depositions of the two principals. David Yurth, president of DAC, was deposed on April 2, 1984 resulting in a 283 page transcript, 36 exhibits, and over 13 pages of corrections. S. M. Horman's deposition was taken April 26, 1984 resulting in a 245 page transcript and several exhibits. No further discovery was conducted by either party.

Horman filed its motion for summary judgment together with supporting affidavits and a memorandum of points and authorities on July 19, 1984, nearly two months after the last deposition was taken and when there were no outstanding discovery requests. Oral argument on the motion was scheduled for August 28, 1984. On August 22, 1984, six days before the motion was to be argued, DAC's counsel moved to withdraw and requested a 60-day extension to respond to Horman's motion. The district court granted both of these requests.

Sixty days elapsed without an appearance from DAC and without response to the motion. Consequently, on October 26, 1984, Horman served written notice on DAC pursuant to Utah Code Ann. § 78-51-36 (1978) requesting that it either appoint counsel or appear in person. On November 2, 1984, Horman renoticed its motion for summary judgment and scheduled the hearing for November 16, 1984. On November 13, 1984, DAC's new counsel entered an appearance and filed a motion for continuance, an "extraordinary request for review," and noticed nine depositions all of which were scheduled <u>after</u> the scheduled oral argument on Horman's summary judgment motion.

On November 16, 1984, the district court heard oral argument on DAC's motion to continue and Horman's motion for summary judgment. The district court denied DAC's motion to continue, took Horman's motion for summary judgment under advisement, and gave DAC an additional twenty days to file a written response to Horman's motion for summary judgment. On December 6, 1984, DAC filed a motion to compel discovery

seeking to "continue" S. M. Horman's deposition.[1] DAC's motion to compel was supported by an affidavit claiming the need for further discovery. After receiving several continuances, DAC filed its memorandum in opposition to Horman's motion for summary judgment on December 10, 1984 together with eight affidavits, some of which were unsworn and unsigned.

The district court denied DAC's motion to compel further deposing of S. M. Horman and granted Horman's motion for summary judgment holding that the oral agreement was void under the statute of frauds and that Horman was excused from performing under the Construction & Lease Agreement because none of the conditions precedent had been performed. This appeal followed.

Three issues are raised on appeal. First, did the lower court abuse its discretion in denying DAC's motion to continue and its motion to compel further discovery? Second, is the oral modification of the Construction & Lease Agreement void under the statute of frauds and, if not, do the uncontested facts demonstrate that Horman was excused from performing under the terms of the modification? Third, did the lower court err in granting Horman's motion for summary judgment ruling that Horman was excused from performing under the Construction & Lease Agreement as DAC failed to satisfy the requisite conditions precedent?

We will review the facts and inferences in the light most favorable to DAC, the party against whom the judgment was granted. Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 229 (Utah 1987).

I.

The first issue we must address is whether the trial court erred in denying DAC the opportunity to conduct further discovery prior to the entry of summary judgment. Generally, summary judgment should not be granted if discovery is incomplete since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion. Auerbach's Inc. v. Kimball, 572 P.2d 376, 377 (Utah 1977). However, a court should deny a motion to continue if the motion opposing summary judgment is dilatory or without merit. See id.

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1. Horman's counsel refused to allow S. M. Horman, an 80 year-old man who already had been subjected to extensive cross-examination during the initial deposition, to undergo yet further deposing until the trial court had ruled on its summary judgment motion.

Rule 56(f) of the Utah Rules of Civil Procedure provides that a party opposing summary judgment may submit an affidavit stating the reasons why he is presently unable to present evidentiary affidavits essential to support his opposition to summary judgment. If the court finds the reasons to be adequate, the court may, among other things, order that further discovery be conducted and continue the summary judgment motion. The Utah Supreme Court, in Cox v. Winters, 678 P.2d 311, 313-14 (Utah 1984), delineated several factors to consider under Rule 56(f):

> 1. Were the reasons articulated in the Rule 56(f) affidavit "adequate" or is the party against whom summary judgment is sought merely on a "fishing expedition" for purely speculative facts after substantial discovery has been conducted without producing any significant evidence?
>
> 2. Was there sufficient time since the inception of the lawsuit for the party against whom summary judgment is sought to use discovery procedures, and thereby cross-examine the moving party?
>
> 3. If discovery procedures were timely initiated, was the non-moving party afforded an appropriate response?

Applying the foregoing legal principles, we find that the district court properly denied DAC's motion to compel further deposing of S. M. Horman and its motion to continue the summary judgment hearing. Both parties conducted extensive discovery. Hundreds of documents were produced. Lengthy depositions were taken. The record reveals that DAC failed to conduct further discovery although it had ample time and opportunity to do so. Discovery essentially ended on April 26, 1984. Three months elapsed before Horman filed its motion for summary judgment. During this three-month period DAC conducted no further discovery. DAC was given six weeks before oral argument on the motion for summary judgment in which to conduct any necessary discovery. Again, DAC sought no further discovery. DAC was also granted an additional 60-day extension specifically to respond to Horman's motion when DAC's original counsel withdrew five days before oral argument was scheduled. These additional 60 days lapsed without DAC entering an appearance or seeking any additional discovery.

On November 2, 1984, nearly four months after Horman filed its initial motion for summary judgment, and with no action by DAC to respond to the motion, Horman again noticed its motion for summary judgment and scheduled oral argument for November 16, 1984 providing DAC yet another two weeks to respond to its motion. Three days prior to the scheduled oral argument, DAC's new counsel appeared and finally sought additional discovery by noticing nine depositions (scheduled after oral argument on the motion for summary judgment).

On December 6, 1984, DAC moved to compel the appearance of S. M. Horman to continue his deposition. DAC's motion to compel discovery was accompanied by an affidavit by its counsel claiming the need for further discovery.[2] This affidavit, however, is deficient as a Rule 56(f) affidavit. It fails to articulate any material area of inquiry not covered by the original deposition of S. M. Horman. Rather, DAC's counsel merely states:

> Having read the Horman deposition there are a number of areas into which Mr. Zoll [DAC's original counsel] did not inquire and disposition of this case in a prompt and reasonable manner depends upon prompt access to the information and alleged testimony which will be given by Mr. Horman.
>
> . . .
>
> There are a number of issues into which the Plaintiff's counsel Mr. Zoll did not inquire and notice was given at the end of the day that the deposition was being continued.

We believe that DAC's counsel was simply on a "fishing expedition" for purely speculative facts after substantial discovery had been conducted without producing any significant evidence. Cox v. Winters, 678 P.2d at 312-313, 314. Moreover, DAC had sufficient time and opportunity before the summary judgment motion was argued to conduct discovery and in fact did so.

We also are of the opinion that DAC had ample opportunity to cross-examine S. M. Horman during his initial deposition. The deposition took an entire day. At the initial

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2. DAC did not identify its affidavit as a Rule 56(f) affidavit. However, the substance of the affidavit suggests it was intended to be such. We are controlled by substance, not captions. Armstrong Rubber Co. v. Bastian, 657 P.2d 1346, 1348 (Utah 1983). Therefore, we will treat DAC's affidavit as a Rule 56(f) affidavit.

deposition, DAC's original counsel requested that S. M. Horman and his counsel be available for two full days. Schedules were rearranged to meet this request. The deposition was stopped abruptly at 4:45 p.m. on the first day. Horman was prepared to proceed further that day and the next as scheduled by DAC's counsel. DAC's counsel, however, chose not to proceed.

By way of summary, the record indicates that DAC had over a year to conduct discovery and had been given several continuances and extensions by the trial judge. DAC did not articulate any specific factual area which needed further probing. Under the totality of the circumstances, the trial court reasonably concluded that no further factual development was necessary and properly denied DAC's motion to compel and its compel to continue.

II.

Next, we must determine if the trial court correctly found that the alleged oral modification of the Construction & Lease Agreement did not preclude Horman's motion for summary judgment.

DAC contends that the parties orally modified the written contract, a contention which Horman disputes, by including an assignment by Horman of part of its leasehold interest in the Harver Warehouse Building to DAC. Both parties agree that Horman contemplated assigning its interest in the masterlease only if Horman was completely released by the owners of the Harver Warehouse Building from all obligations under the lease. The alleged oral modification also contained two other conditions precedent which were identical to those identified in the Construction & Lease Agreement. First, DAC was required to secure "adequate" construction and long-term financing, and second, DAC was to provide acceptable engineering reports to Salt Lake City to obtain the appropriate building permit to reinforce and reconstruct the Harver Warehouse Building.

DAC concedes that when the statute of frauds requires a contract to be in writing, Utah Code Ann. § 25-5-3 (1984), any alteration or modification must also be in writing. Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975). DAC, however, argues that the oral modification of the Construction & Lease Agreement was removed from the bar of the statute of frauds under the doctrine of partial performance. Utah Code Ann. § 25-5-8 (1984).

DAC alleges that it partly performed the oral modification by attempting to secure the specified construction and long-term financing, by selling memberships to the clubs, and by retaining firms to perform the engineering studies. All

of the acts alleged, including the engineering studies and the financing, were not exclusively referable to the oral modification but were also required under the original Construction & Lease Agreement and thus would not remove the oral modification from the statute of frauds. See McDonald v. Barton Bros. Inv. Corp., 631 P.2d 851, 853 (Utah 1981). More importantly, however, even if the oral modification was enforceable, DAC's position still fails. As more fully developed in section III of this opinion, the conditions precedent to the oral modification were not satisfied and thus Horman's obligation to perform under the oral modification never arose.

III.

The third issue on appeal is whether the trial court erred in concluding as a matter of law that none of the conditions precedent to the written contract were satisfied thus excusing Horman's obligation to perform.

It is undisputed that all the conditions precedent to the Construction & Lease Agreement had to be satisfied before Horman became obligated to construct and ultimately lease the athletic clubs to DAC. If one condition was not satisfied, Horman was excused from performing.[3] A review of the record discloses that DAC failed to satisfy several of the conditions precedent to the written agreement.

As previously discussed, Horman was to make improvements provided that the Harver Warehouse Building could be reinforced at a price that was acceptable to both parties, and in a manner that would satisfy the requirements of the Salt Lake City Building Department. This provision really contains two conditions precedent involving engineering studies. Engineering studies had to be completed before the cost of reinforcement could be determined and before the Building Department could consider whether to issue the appropriate permit.

The undisputed facts in the record indicate that although DAC attempted to have engineering studies performed on the Harver Warehouse Building, no final engineering study was

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3. The Construction & Lease Agreement did not contain an express "time is of the essence" provision. Therefore, DAC had a reasonable time under the circumstances in which to satisfy the conditions precedent. Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980). The agreement was executed on May 8, 1981. DAC filed its complaint on September 9, 1983. Therefore, DAC had over two years to satisfy the conditions. Neither party questioned whether this was a sufficient amount of time for DAC to perform.

Affirmed. Costs to Horman.

Judith M. Billings, Judge

WE CONCUR:

Norman H. Jackson, Judge

R. W. Garff, Judge

in fact completed much less submitted to the City for approval.

DAC originally retained Bonneville Engineering to conduct the engineering studies. DAC later retained Scott Evans, managing partner of Cornwall Evans & Fife, architects. Evans in turn hired Ronald Weber of Weber & Associates to conduct the requisite engineering studies and determine costs. Scott Evans, in a sworn affidavit, claims that he hired a structural engineer to "suggest appropriate engineering upgrades or structural reinforcements" as required by the City. Scott Evans, however, merely states that the "results" of the engineering study and recommendations for structural reinforcement and preliminary drawings were presented to Roger Evans, assistant director of the Department of Building & Housing Services for Salt Lake City Corporation. Scott Evans admits that Roger Evans, in a meeting, required final working drawings of the suggested engineering solutions. Conspicuously absent from Scott Evans' affidavit is his sworn statement that he did in fact submit the final engineering drawings and seismic analysis to the City and that they were approved.

Roger Evans, the assistant director of the Department of Building & Housing Services for Salt Lake City Corporation, in his affidavit, states that DAC never submitted any plans, specifications, engineering reports or the requested seismic analysis to the Department. In light of Roger Evans' and Scott Evans' affidavits, it is uncontroverted that the requisite engineering studies were never submitted to the City. Consequently, the cost of reinforcement of the Harver Warehouse Building could not be determined and the City could not approve such reinforcement. Therefore, we affirm the trial court's conclusion that this condition precedent was not satisfied and Horman's obligation to perform under either the original Construction & Lease Agreement or the alleged oral modification was excused.

Having found that this one condition precedent has not been performed, we decline to address whether DAC satisfied any other conditions because, as previously discussed, all the conditions precedent had to be satisfied before Horman's performance was required.

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IN THE SUPREME COURT OF

THE STATE OF UTAH

DOWNTOWN ATHLETIC CLUB, a Utah Corporation Plaintiff & Appellant, vs. S.M. HORMAN, an Individual aka Sid Horman; S.M. Horman & Sons, a Partnership; & S.M. Horman & Sons Co. Defendants & Respondents.	ORDER EXTENDING TIME FOR FILING WRIT OF CERTIORARI SUPREME COURT NO._____
S.M. HORMAN & SONS CO. Counter-Plaintiff & Respondent, vs. DOWNTOWN ATHLETIC CLUB, a Utah Corporation, & DAVID YURTH, an Individual Counter-Defendants & Appellant.	Court of Appeals No. 86-0109-CA

Based upon the motion of the appellant here attached together with the Affidavit of Counsel and good cause therefore appearing, it is hereby ordered:

That the time within which a petition for a Writ of Certiorari may be filed is expanded to and including 10 days from the date of this order to and including the ~~8th~~ 15th day of October, 1987.

DATED this ~~28th~~ 5th day of ~~September~~ Oct, 1987.

By the Court:

Richard C. Howe

Honorable Judge

DATED this 29th day of September, 1987.

Lorin N. Pace

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Notice of Hearing Motion postage prepaid this 29th day of September, 1987 to: L. Ray Gardiner, Jr., 50 South main, SLC, Ut. 84101.

Secretary